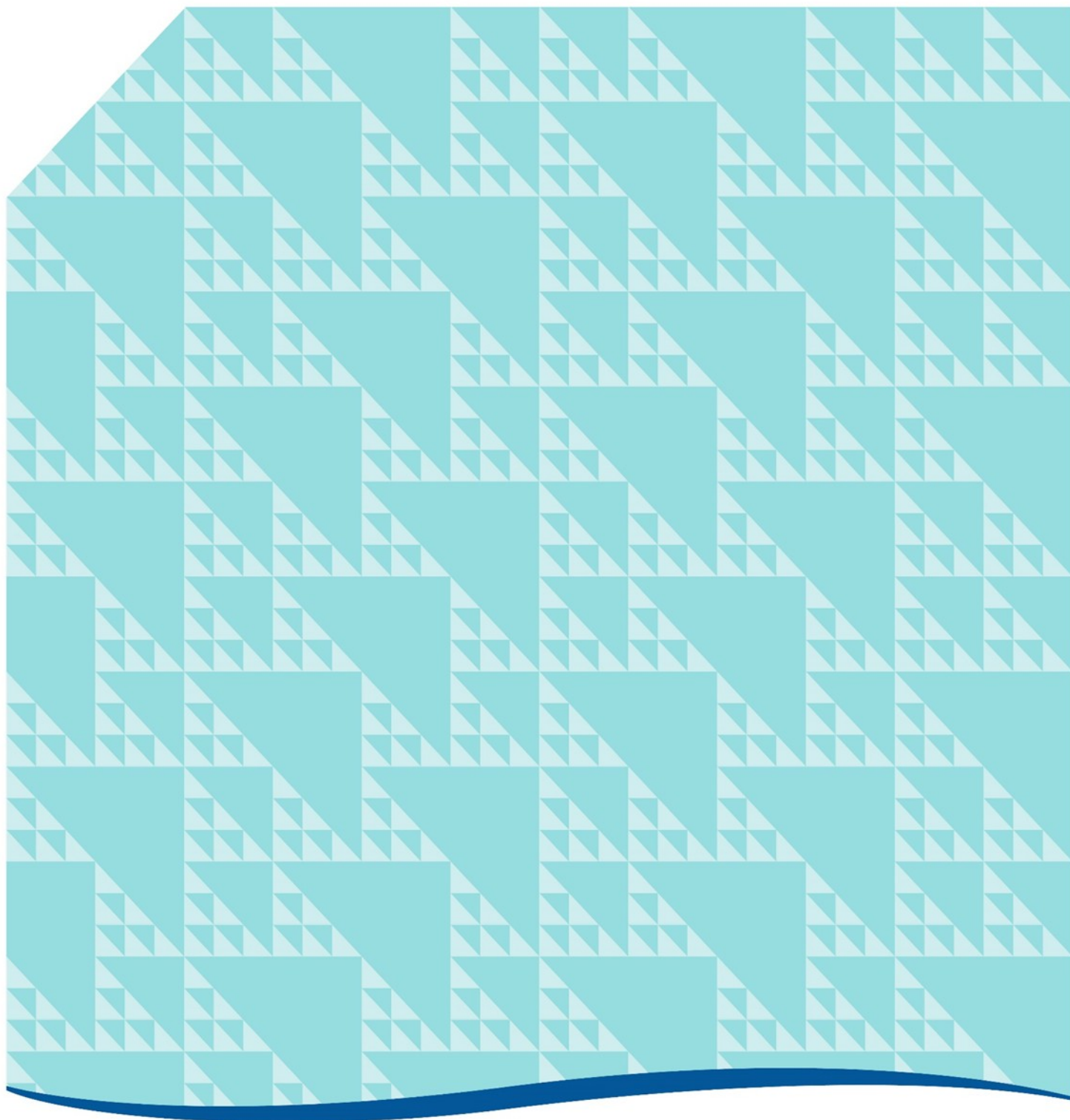


2017 Review of Tasmania's

Rail Access Framework

# Discussion Paper



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# Executive Summary

The Department of State Growth (the Department) is reviewing the access framework relating to the Tasmanian Railway Network. This paper establishes a number of draft recommendations on which the views of stakeholders are sought. Following this consultation process, recommendations will be provided to the Tasmanian Government for consideration.

The Tasmanian Rail Access Framework provides the mechanism by which the Tasmanian Government implements the principles of National Access Regime and Competition Principles Agreement. These principles ensure that third party operators are able to negotiate for access to monopoly infrastructure.

The review follows the October 2017 expiration of the 2007 Access Declaration. The review takes account of the current context of rail services in Tasmania, including changes to ownership and the investment in rail infrastructure since the 2007 Declaration was made.

The intent is to develop a new Rail Access Framework that is fit-for-purpose for the Tasmanian context and which minimises the costs to both the rail owner and third party access seekers.

Through this review, the Department has undertaken early consultation with key stakeholders and this paper and the draft recommendations address the major access related issues raised.

In summary, the principles and intent of the 2007 Declaration appear to remain appropriate, however the way in which these are implemented could be improved. The draft recommendations, found in Section 9 of the paper, reflect this and aim to recommend changes that will improve transparency, provide greater surety and guidance, implement a fit-for-purpose dispute resolution process and reduce time and financial costs for all parties.

The Department welcomes the comments of stakeholders on the draft recommendations.

## 1. Purpose

The Department of State Growth has commenced a review of access arrangements for the Tasmanian Rail Network. The current access framework has been in place since October 2007 and expired in October 2017.

This Discussion Paper considers the main options for replacing the current framework and discusses the scope of the current and any future access regime,

including access pricing. It includes draft recommendations for consideration. Comment by stakeholders is invited to inform the final recommendations to be submitted to the Tasmanian Government for its consideration.

It is important to note that, even though the Tasmanian Declaration has expired, the National Access Regime continues to apply in Tasmania while the new framework is being developed.

## 2. Background

In October 2007, pursuant to powers under section 44F of the then *Trade Practices Act 1974*, the Premier of Tasmania declared that the Tasmanian Rail Network (as it existed at that time) was a 'service' under Part IIIA of the Act. This delivered a transparent process for negotiating to gain access to operate train services on the Tasmanian Rail Network and formal arbitration provisions in the case of any dispute.

This declaration regulated the cost and conditions of access to the network for train service operators.

Upon expiration of the current access regime a decision must be made whether to seek a new declaration under the new *Competition and Consumer Act 2010* (CCA) or to find alternate ways to regulate access to the network.

## 3. Current Context

### 3.1. The Tasmanian Rail Network (TRN)

Tasmania's rail network plays a key role in the State's land freight network, connecting industry to Tasmania's key freight hubs and northern ports. The operational network is a single line, narrow gauge system, extending from Brighton to Western Junction and to the Port of Bell Bay in the north east and Burnie in the northwest. Connections are also provided to Fingal in the east and Boyer in the Derwent Valley. The Melba Line (formerly named the Emu Bay Line) connects the West Coast to Burnie. The lines comprising the TRN are set out in Schedule 1 of the *Rail Infrastructure Act 2007*.

Below-rail assets include 611 kilometres of operational track and 232 kilometres of non-operational track. The operational network is accredited and utilised for freight services.

The TRN operates under the *Rail Infrastructure Act 2007* and the Rail Safety National Law (see 3.6).

## 3.2. Ownership

The 2007 Access Declaration was established when the below rail assets were transferred from a private company (Pacific National) to the Tasmanian Government but above rail operations remained in private ownership (Pacific National). Following a decision by Pacific National to cease Tasmanian operations, in December 2009 the Tasmanian Government acquired the rail operations and the Melba Line. This brought together all of the operational rail freight network under common ownership.

Tasmania's rail network is currently owned and operated by the State-owned company Tasmanian Railway (TasRail), which operates as a vertically integrated 'above rail' (train services) and 'below rail' (rail network) business. Under this business model TasRail, as the below rail network operator, charges users of the network (including its above rail arm) for services provided.

## 3.3. Government Expectations

As owners, the Tasmanian Government sets out its broad policy expectations of TasRail through a Statement of Expectations. The most recent Statement of Expectations was issued on 18 April 2012 and includes the following statements relevant to an access framework:

- The principal purpose of TasRail is to provide rail freight services in Tasmania.
- The focus of the business should be on operating a safe, reliable and efficient rail freight service and on increasing the Company's share of the Tasmanian freight market.
- Expansion activities should only be undertaken where supported by commercial outcomes or where approved by the Portfolio Minister and the Treasurer.
- TasRail should only upgrade the network for specific third party access where the upgrade is funded from the party seeking access.
- Below rail access fees must be transparent and levied on above rail operations of the Company in the same manner as imposed on third parties in accordance with the approved Tasmanian Rail Access Framework.
- TasRail is to manage access arrangements, including pricing, to all access seekers (including itself) in accordance with the Tasmanian Rail Access Framework.

## 3.4. Investment

The TRN has attracted significant attention over the past decade, moving from a privately-owned business characterised by under-investment, to a Tasmanian

Government-owned entity that has attracted higher levels of funding to deliver renewed infrastructure and rolling stock. The TRN operates as a freight rail network, with investment focussed on improvement of the efficiency, reliability and safety of freight rail services.

The recent investment by the Tasmanian and Australian Governments in Tasmania's rail infrastructure and rolling stock has significantly improved safety and reliability across the network.

## 3.5. Rail Market

The TRN currently operates freight rail services, with only one company (TasRail) operating above rail services in the State. The existing customer base for freight rail services in Tasmania is small, with a small number of large bulk freight customers accounting for a high proportion of total volumes.

During the 10 year period that the current access declaration has been in place, no other freight operator has applied for access to the network. There are currently no indications that a third party will seek access for freight rail services in the foreseeable future.

The TasRail above rail business pays the established access fees to the below rail business as would any access seeker. Work undertaken by the Department of State Growth indicates that demand for rail freight services is highly price sensitive and the contestable freight market is small.

TasRail, as the network operator, is responsible for granting access to the rail network and terminals to rail operators seeking access to the network. There has been interest from tourism operators for use of the network, however there are also rail safety accreditation and insurance requirements which none of the proponents have been able to satisfactorily conclude.

## 3.6. Legislative Framework

The TRN, operated by TasRail, has a number of governing pieces of legislation. These are briefly described below.

### 3.6.1. *Rail Infrastructure Act 2007*

The *Rail Infrastructure Act 2007* provides for and facilitates the operation of the TRN, including attendant land and infrastructure. Railways applicable to the Act are included in Schedule 1 to the Act and include the operational and non-operational lines. Effectively, any rail access framework would apply to the TRN as specified in Schedule 1 of the Rail Infrastructure Act.

### 3.6.2. Rail Safety Law

The 2007 framework referenced the State-based *Railway Safety Act 1997* (Tas) in terms of rail operators' accreditation and insurance arrangements,

however this legislation has been repealed and the safety regulation environment has been updated.

Following a Council of Australian Governments (COAG) commitment to national reform of rail safety regulation, the Office of the National Rail Safety Regulator (ONRSR) was established and commenced operation in 2013 with responsibility for regulatory oversight of rail safety law across jurisdictions. The ONRSR is responsible for rail safety regulation in Tasmania through the *Rail Safety National Law (Tasmania) Act 2012*. This Act applies the Rail Safety National Law, set out in the South Australian *Rail Safety National Law (South Australia) Act 2012*, in Tasmania. All rail operations in Tasmania must comply with this National Law, including the requirements for accreditation and insurance.

### 3.6.3. Rail Company Act 2009

The *Rail Company Act 2009* establishes TasRail as a State-owned Company for the purposes of acquiring, owning and operating a rail business in Tasmania. The Act establishes TasRail's principal objectives, namely to:

- operate a rail business in Tasmania, effectively and efficiently;
- operate its activities in accordance with sound commercial practice; and
- maximise sustainable returns to its Shareholder Members.



## 4. Is an Access Framework needed?

In considering the expiration of the existing Access Declaration, it is important to consider if an access framework is required for the TRN. Tasmania does not have specific legislation regulating the access framework as exists in other jurisdictions with larger and more complex rail markets. However, anti-competitive behaviour can arise where there is substantial market power afforded to a market participant and where there is potential for this power to be exercised and misused. An access framework can be used to protect against such anti-competitive behaviour.

While there is no evidence of the misuse of market power by TasRail, the fact that the TRN is monopoly infrastructure means that some form of regulation to ensure the ability for operators to negotiate access to below rail services in a fair and equitable manner would be beneficial. The size and maturity of the Tasmanian rail market must also be taken into account in determining the extent and format of the access framework and the level of regulatory burden that is imposed. Any access framework should be designed for the current context of the TRN. All indications are that a light-handed regulatory approach would be appropriate in the current context.



# 5. Stakeholder Consultation

As part of the review, the Department of State Growth undertook early consultation with key stakeholders including TasRail, the Tourist and Heritage Rail sector and the Department of Treasury and Finance. The purpose of this consultation was to identify any issues with the existing rail access framework and to gain an understanding of possible future needs of stakeholders in considering a new access regime and pricing model.

All stakeholders have a further opportunity to provide feedback on the draft recommendations in this Discussion Paper.

## 5.1. Consultation Summary

The major comments on the access framework were received from the Tourist and Heritage Rail sector. Discussions with the Department of Treasury and Finance centred on options for the future framework structure and pricing principles. These discussions have informed the content of this Discussion Paper.

### 5.1.1. Tourist and Heritage Rail Sector

While a range of issues were raised, a number were outside of the scope of this review. These issues have been passed on to the Minister for Infrastructure for information. In relation to the access framework, a small number of issues were consistently raised and are addressed where appropriate in this Discussion Paper. The issues raised related to:

- the need for a transparent process for applying for access with clarity on requirements for access, including funding and payment for upgrades;
- ensuring clear separation between the below rail and above rail operations of TasRail;
- an ability to have provisional access rights granted by the below rail operator to facilitate accreditation with the Rail Safety Regulator;
- clear low cost and independent review and appeal provisions;
- independent costs assessment for remediation of lines; and
- clarity on insurance coverage and costs.

### 5.1.2. TasRail

Discussions with TasRail centred primarily on the development of the access pricing methodology, however the issues raised by the tourist and heritage rail

sector and how a future framework could attempt to address these issues were also discussed. TasRail will have the opportunity to provide further comment on the draft recommendations in this paper.

## 6. Principles

The Application for the 2007 Declaration contained the Tasmanian Government's key policy basis for rail access. The principles that underlie any future access framework should also be clearly stated. On the basis of discussions and consultation to date, these principles should include:

1. The principles of the National Access Regime and Competition Principles Agreement apply in Tasmania regardless of the form of the access framework.
2. All accredited operators should be able to share the capacity of the upgraded Tasmanian Rail Network.
3. The role of the below rail operator is to manage the requirements of all above rail operators in a way that maximises the utility of the railway network for its users, which includes giving priority to freight, works and other users (in that order).
4. Access fees are set by the Tasmanian Government and will be substantially lower than access charges elsewhere in Australia because maintenance and capital contributed by the Australian and Tasmanian governments are not reflected in the network charges.
5. The network operator retains residual discretion, that is, the access framework does not provide a contractual obligation but rather provides third party operators with a right to negotiate access and to seek arbitration if they are unable to secure appropriate train paths in a timely manner.
6. The expectation that the benefits of government investment in improving infrastructure will be passed onto end customers via increased downstream competition.
7. The pathway to seeking access should be clear and easily understood by third party operators, with publicly available documents to support this process.
8. The access framework should be supported by a simple, low cost and independent dispute resolution process.
9. The below rail and above rail businesses of TasRail should be ring-fenced for the purposes of determining the cost base for access charges and in assessing applications for access to the Tasmanian Rail Network.

These broad principles are consistent with the principles of the 2007 Declaration but have been expanded to reflect the additional expectations around the transparency and simplicity of the framework as well as a modernised approach to setting access charges.

## 7. Governance – Form of Access Framework

As the TRN is not part of a broader multi-jurisdictional network, there is flexibility in determining not only the access framework that will apply but also how it will be implemented. The approach taken by each jurisdiction depends on the size and maturity of their rail network and task.

### 7.1. Options

The form that the Access Framework takes should be fit-for-purpose for the current context that the TRN operates in and the associated market conditions as well as allowing for change, such as proposals to develop new and different services. It should provide the framework and conditions under which a party may negotiate for access to the defined infrastructure and services in a way that minimises the costs and administrative burden to all parties in complying with the framework. It should also provide an appropriate and accessible dispute resolution process. As a general principle, a regulatory framework should aim to be efficient, equitable and simple.

Since the original declaration was made, the governing Commonwealth legislation has been superseded by the *Competition and Consumer Act 2010* (Cth), which consolidated national consumer protection law into one Act. Therefore, extending the 2007 Declaration under the *Trade Practices Act 1974* is not possible.

It should be noted that, regardless of the form of the access framework, the overarching National Competition Policy and National Access Regime principles will continue to apply. This means that if a framework under the auspices of the Australian Competition and Consumer Commission (ACCC) is not implemented in Tasmania at this time, this does not prevent a third party seeking an access Declaration at any time subject to meeting the requirements for a Declaration (see 7.1.1).

#### 7.1.1. Declaration under the Competition and Consumer Act 2010 (CCA)

A declaration under the CCA provides access seekers with an enforceable right to negotiate terms and conditions of access with the service provider and,

failing agreement, a right to arbitration of the dispute before the ACCC. An access declaration can be sought by the service provider or by an access seeker where an access undertaking or state certified regime is not in place (see 7.1.2 and 7.1.3).

To have a service declared, a set of tests must be satisfied. These are set out in section 44(H)4 of the CCA, namely that:

- a) access would promote a material increase in competition in at least one dependent market;
- b) it would be uneconomical for anyone to develop another facility to provide the service;
- c) the facility is of national significance having regard to size, importance to trade or commerce or importance of the facility to the national economy;
- d) it is not already subject to a certified access regime; and
- e) access, or increased access, to the service would not be contrary to the public interest.

The nature of the rail market in Tasmania and the legislation governing access declarations have changed since the original Declaration was made in 2007. It is not clear that the TRN would meet the tests set out in the CCA, however this could be tested through an application to the National Competition Council (NCC). This process involves an independent advisory body, extensive consultation mechanisms and a Ministerial decision. It requires the development up-front of a submission addressing each of the tests set out in the CCA and consideration of that submission by the NCC, including a public consultation process. This option requires resourcing by the State, the NCC and stakeholders and can take up to 180 days.

The Declaration process is the most administratively and regulatory burdensome option and is most appropriate in a large or complex market where competition is, or is likely to be, strong.

### 7.1.2. Access Undertaking

An undertaking under the CCA sets out matters relevant to obtaining access to a particular service, such as the terms and conditions of access and an arbitration process. It is court enforceable. If an access undertaking is accepted by the ACCC it means that an access declaration cannot be sought.

To have an access undertaking accepted, an application is made by the service provider (in this case TasRail or the Tasmanian Government) to the ACCC which is required to undertake a threshold assessment and a public consultation process. This process can take up to 180 days.

The access undertaking process is an intensive process involving significant resources by both the service provider and the ACCC.

### 7.1.3. State Certified Regime

A State may apply to the NCC for a recommendation to the Commonwealth Minister that a state access regime be certified as an effective access regime. If a service is subject to a certified access regime, it means that an access declaration or an access undertaking cannot be sought.

Applications for certification are assessed against clauses 6(2) to 6(4) of the *Competition Principles Agreement* which sets out the types of infrastructure services that may be subject to an access regime and also the broad requirements and framework for regulated access under the National Access Regime.

If a state certified regime was determined as the most appropriate option, consideration would need to be given to how this would be delivered, that is, whether the most efficient approach would be to manage it through the Department of State Growth or to bring it under the scope of the Tasmanian Economic Regulator.

The Tasmanian Economic Regulator is an independent economic regulator established under the *Economic Regulator Act 2009*, with a number of other Acts setting out the Regulator's legislative responsibilities. The Regulator is supported by the Office of the Tasmanian Economic Regulator (OTTER).

The Tasmanian Economic Regulator regulates a number of monopoly, near-monopoly and specified industries within Tasmania. The regulated businesses operate in the electricity, gas, water and sewerage, taxi and compulsory third party insurance industries in Tasmania. In regulating these businesses, the Regulator aims to protect the long term interests of consumers with respect to the price, quality and reliability of services.

Should the Government determine that the Tasmanian Economic Regulator was the most appropriate oversight body, this would need to be established as a function under the Regulator's governing legislation.

### 7.1.4. State-Based Policy

A State-based policy framework consistent with the principles of the National Access Regime would provide the same access rights and obligations as a formally certified regime, an access undertaking or a declared service.

A State-based access policy would include provisions for resolution of access disputes but would not include the ACCC as the arbitrator. Using an appropriate alternative dispute resolution process would address the concerns raised through the consultation process in relation to the perceived time and financial cost of accessing the ACCC arbitration process. It would provide a more accessible process with the aim of achieving a negotiated outcome before an arbitration process is required. The addition of a local and independent arbitrator, if required, would improve accessibility and reduce costs.

A State-based access policy would provide improved flexibility and allow the framework to adapt more easily to changing circumstances in the future. This is particularly important given the demand for access to provide new services is likely to come from passenger rail proponents, which would introduce a new type of service onto the TRN and may raise issues that have not been envisioned at this time. It would also provide a simpler method for lines to become operational and access charges to be set.

The flexibility to adapt the access policy without the need to establish a new Access Declaration would be beneficial and would increase the responsiveness of the State's approach and ability to respond to any issues.

A State-based access policy would be administratively simpler to implement and would leave open the option for a Declaration to be sought from the ACCC by the service provider or by an access seeker at any time in the future. It would also be expected to reduce the complexity and costs of dispute resolution compared to the 2007 Declaration.

#### 7.1.5. Do Nothing

By taking no action the current Access Framework (Declaration) will lapse and no formal access framework will take its place. This does not prevent a Declaration being sought in the future by the service provider or an access seeker.

Doing nothing would reduce the transparency of access provisions and would not provide a clear path for negotiation or arbitration. It would also result in the need for access pricing to be established separately from a formal access framework.

## 7.2. Comparison of Options

Testing the options against the aim to be efficient, equitable and simple it is important to note that these three criteria can, and often do, conflict with each other and that it is necessary to maintain a balance between the criteria to obtain optimal regulation.

Less prescriptive approaches encourage negotiated outcomes with the potential for arbitration if there is a dispute. These approaches are generally lower in regulatory cost. The more prescriptive an approach, the higher the cost, but the outcomes are more defined which may be of benefit in some circumstances.

The option to do nothing is not consistent with the State's obligations under National Competition Policy and is therefore not considered a viable option. It is recommended that some form of rail access framework apply in Tasmania.

The remaining options discussed above reduce in complexity and administrative burden in the order listed. That is, the most complex option is a Declaration, with the least complex option being a State-based policy framework. The benefits of

entering into a formal Declaration, Access Undertaking or Certification compared to instituting a State-based policy must be considered in the context of the complexity of the TRN and the time and financial costs that each option would impose on all parties, including the Government, TasRail, the ACCC and above rail access seekers.

Due to the size of the rail network and customer base and the fact that road transport acts as an effective constraint against the misuse of market power by Tasmanian rail operators, a complex arrangement is not seen as necessary in Tasmania. This leads to the conclusion that the most fit-for-purpose approach in Tasmania would be a State-based rail access policy with appropriate dispute resolution mechanisms.



## 8. Scope of Access Framework

The ownership and management of Australian rail infrastructure and rail operations is generally divided into 'below rail' (track management) and 'above rail' (operators of trains and rolling stock). The access framework applies to the provision of infrastructure and services, commonly referred to as 'below rail'. The access framework provides for the negotiation of access to certain railway infrastructure services (below rail services), with the potential for dispute resolution should negotiations fail.

### 8.1. Infrastructure and Services Covered

The 2007 Tasmanian Rail Access Declaration is in respect of the use of the rail tracks and associated infrastructure that comprised the TRN for the purpose of operating a rail service on the Tasmanian network. This includes, but is not limited to, loading and unloading freight, making up trains, shunting and other activities necessary for the efficient haulage of freight by rail.

The facility covered in the Declaration includes:

- the infrastructure that comprises the TRN consisting of rail lines, crossing loops, sleepers, ballast, cuttings, tunnels, embankments, bridges, culverts, rail tracks and yards on wharves, fastenings, points, poles, pylons, structures and supports, signalling equipment, overhead lines, platforms, railway stations, freight sheds and associated buildings (excluding terminals), workshops, electrical substations, train communication systems, plant, machinery, and other fixed equipment; and
- the rail terminals at Devonport, Hobart, Burnie and Launceston.

At the time of the Access Declaration, the TRN included the Bell Bay, Derwent Valley, Fingal, South, North-East, Western and Zinc Works lines but did not include the Melba Line as it was still under private ownership. The Melba Line has subsequently been transferred to TasRail and a policy decision was made that the Access Declaration was to apply to the Melba Line from the time it transferred to public ownership, however the Declaration was not formally amended.

This infrastructure and service is generically referred to as 'below rail' as it does not include the operation of a train service, or 'above rail' activities, but provides the infrastructure and services necessary for a train service to be operated.

The defined infrastructure and services, with updates for changes in the network and line ownership are considered to remain relevant. The below rail service will need to be redefined to incorporate changes to the network, and be flexible to manage any future changes to the network. However, it would be clearer to simplify the definition of the services covered in any new access framework to

simply refer to the physical infrastructure and the services required to operate the below rail network.

Schedule 1 to the *Rail Infrastructure Act 2007* prescribes the railways applicable to the Act including the operational and non-operational lines operated by TasRail. Effectively, any rail access framework would apply to the TRN as specified in Schedule 1 of the *Rail Infrastructure Act 2007*.

## 8.2. Infrastructure to be fit-for-purpose

While the access framework will technically apply to all of the TRN, the network includes lines and infrastructure of varying standards, some which would be immediately suitable for the operation of above rail train services and others which would require varying levels of investment. This necessitates a case-by-case approach to consideration of access for a proposed train service, dependent upon a range of factors including the location, current standard of the infrastructure, type of service and the compatibility of rolling stock with the network.

As access can only be granted once the infrastructure is fit-for-purpose for the proposed service, this effectively means that those sections of the network that are currently operating services are most easily accessible for new services and will therefore be the focus of the initial access pricing structure for freight rail services.

The fact that a type of service (such as passenger rail) is not currently operated on the rail network, or that a section of network is not currently operational, does not automatically preclude access to that section of the network in the future. Such access would be subject to investment to ensure it is fit-for-purpose (see section 8.3). It would require an alignment of the service and the infrastructure which may require investment by the proponent, the infrastructure owner or both to ensure the below rail infrastructure is fit-for-purpose for that service.

The determination of the standard required and the costs of any improvements would need to be assessed for each proposed service as the type of service, the proposed operations and the type of rolling stock will all be factors. Initial consultation identified that there is often a different opinion between the access seeker and the rail infrastructure owner as to the cost of work required. To overcome this, during consultation it was suggested that an independent analysis be undertaken and costed. The costs of such an assessment would, under the Tasmanian Government's current statement of expectations, need to be borne by the access seeker.

## 8.3. Investment in the Network to allow access

As discussed in section 8.2, where investment is required in the network to enable a proposed service to operate, it would require agreement on the

investment required and who would be responsible for undertaking and funding such investment.

The Tasmanian Government's Statement of Expectations for TasRail (section 3.3) clearly establishes that the focus of investment by the business should be to improve the efficiency and competitiveness of freight rail services. The Statement of Expectations further states that TasRail should only upgrade the network for specific third party access where the upgrade is funded from the party seeking access. Where there are demonstrable benefits to the operation of freight rail services from the proposed investment, this could provide the ability to negotiate some sharing of the costs.

Access cannot be provided to the below rail network if it is not fit-for-purpose for the proposed service. Therefore, an in-principle agreement between the parties on the actions and investment required to enable the service to operate, including funding responsibility, is required before a final access agreement can be negotiated.

## 8.4. Prioritisation of Access to the Network

All rail access frameworks within Australia provide for a prioritisation of access to the network. The TRN currently operates as a freight rail network linking industry and ports, with investment focussed on specific lines to improve the efficiency and effectiveness of freight rail services. This does not preclude the operation of other services on the network, however this would need to be assessed on a case-by-case basis.

To maximise the utility of the rail network, the current prioritisation of access is to the following categories of use (in the order listed):

1. freight;
2. works (including emergency access); and
3. other users.

Given the nature of the rail network and the range of uses for which operators may wish to gain access, the network operator will need to negotiate specific train path arrangements with each accredited rail operator based on that operator's actual requirements, in order to maximise the utility of the network for all users.

Based on the stated Government expectations and the continued focus on the TRN as a freight rail network, the current prioritisation would appear to remain appropriate.

## 8.5. Pre-requisites to a final Access Agreement

While negotiations for access to the below rail network can be undertaken in good faith, there are a number of conditions that must be met before the below rail operator can provide a final access agreement to operate a service. These conditions arise from obligations under the National Rail Safety Law (section 3.6) or from the stated expectations of the Government (see section 3.3).

Through the consultation process, it has been identified that the matters discussed below have become barriers to access and there would be benefit in clarifying these matters. In particular, the most pressing constraint to formally seeking access appears to relate to the interlinked nature of access agreements and accreditation. Both accreditation and final access agreements rely on each other for final approval. That is, access can only be provided to an accredited service provider, however accreditation cannot be finalised without a real and genuine prospect of access.

It would appear most appropriate for proposals to be progressed through two concurrent streams - one between the below rail infrastructure manager and the above rail service proponent to progress an access agreement, and the other between the above rail service proponent and the Rail Safety Regulator to progress accreditation. As discussions progress and near completion, these two streams will intersect to enable accreditation and an access agreement to be finalised, for example through an in-principle agreement or statement of intent to provide access subject to final accreditation and investment funding and/or a similar statement of an intention to provide accreditation subject to access being likely.

### 8.5.1. Accreditation

Under the National Rail Safety Law (the National Law), all operators of above rail services (rolling stock operators) must be accredited. The costs of accreditation are borne by the above rail service operator.

Section 61 of the National Law states that the purpose of accreditation of a rail transport operator in respect of railway operations is to attest that the rail transport operator has demonstrated to the Regulator the competence and capacity to manage risks to safety associated with those railway operations.

The Regulator will assess the competency and capability of all involved in the proposed rail service operation, including assessment against 30 separate elements of the proposed operation. To become accredited, applicants must also hold the appropriate insurance (see 8.5.2 below).

Below rail services must also be accredited (rail infrastructure manager). TasRail is currently accredited as the Rail Infrastructure Manager of the TRN. This accreditation includes assessment of the appropriate insurance to operate a rail freight network. Should the operations on the network expand to

involve passenger services a different insurance may be required with associated costs (see 8.5.2 below).

#### 8.5.2. Insurance

To obtain accreditation under the National Law, appropriate insurance for the type of service is required. While the National Law does not prescribe an amount of insurance, the industry standard utilised in most other jurisdictions is to require \$250 million of public liability insurance. The approach to this differs by jurisdiction, with some Governments providing a subsidy or underwriting part of this insurance requirement.

Under the National Law, it is the responsibility of the applicant for accreditation to demonstrate that the level of insurance is adequate. This may be achieved through the advice of an insurance assessor or actuary.

In relation to the below rail business, TasRail currently holds insurance consistent with the services it operates on the network, that is, freight services. Any change in the services for which access is to be granted would require a reassessment of the appropriate level of insurance.

There are costs associated with obtaining appropriate insurance. Where this insurance is consistent with TasRail's core business as established through its owner's expectations, it is reasonable for the business to bear these costs. However, where the costs of insurance are to enable a service outside of its core business to operate, it is not reasonable to expect the business to bear these costs. It would be reasonable for additional costs to be paid for by the beneficiary of the accreditation, that is, by the access seeker.

#### 8.5.3. Infrastructure is 'fit-for-purpose' for proposed service (see also 8.2 and 8.3)

There are no legislated 'track standards' for freight or passenger services, however the infrastructure must be safe for the proposed operation, that is, it must be fit-for-purpose.

Through significant investment the track standard and safety performance of the operational TRN has improved significantly and is appropriate for the current freight rail services. However, given the inherently greater risk of passenger operations and the different combination of rolling stock that may be used, the existing infrastructure may require upgrading for it to be deemed as safe for a proposed passenger service. This is particularly likely to be the case on non-operational components of the TRN. The extent of any upgrade would need to be assessed on a case-by-case basis and would depend upon the condition of the existing line and the proposed above rail service. An access seeker would need to obtain an assessment by an appropriately qualified professional with knowledge and experience in this area to advise what investment may be required for a proposed service.

## 8.6. Pricing – Access Charge

As part of this review of the Tasmanian Rail Access Framework, the Department will provide an updated, contemporary charging structure to support the overarching governance framework and meet the Tasmanian Government's objectives for the rail network.

A contemporary cost base, cost base allocation methodology and pricing structure will improve the legitimacy of the rail access regime; and will provide the foundation to move towards a more transparent pricing regime.

The objective of the 2017 Rail Access Pricing Review is to ensure an appropriate pricing regime is in place by 1 July 2018 that is consistent with the Government's policy objectives for rail and applies best practice principles to the greatest extent possible.

The current access charge was established in 2007, with annual charges set each year over a ten year period. The existing charges are defined for each operational segment of the TRN and are a fixed charge per service regardless of the length of service or mass being carried.

The new access charges will be developed using an updated cost base and a more contemporary methodology. The charges will be established as a two part charge for each operational line, with a flag fall component reflecting recovery of fixed costs and a variable component reflecting usage of the network.

Access charges will be applied consistently to all access seekers, including TasRail's above rail business. While access charges can currently be determined based on the costs of providing a freight rail service on operational lines, it is not possible to determine charges for non-operational lines or for passenger services at this time. As it is likely that any such services would require investment and potentially the provision of different maintenance and service costs, this cost base would need to be determined following any such investment. Access charges for passenger services or previously non-operational lines could then be calculated consistent with the Government's pricing methodology.

## 8.7. Dispute Resolution Process

A cost effective and transparent dispute resolution process was identified through consultation as one method of reducing the barriers to a third party gaining access to the TRN.

While the more formal governance options, including the 2007 Declaration, utilise the ACCC as a dispute resolution process, this is perceived as a costly and time consuming process that will not be utilised by volunteer groups which form the majority of tourist and heritage rail proponents.

Under the proposed State-based access policy framework, a simplified and local dispute resolution process could be implemented. This would involve escalation of the matter at various points if required. This may involve some cost to both parties.

The proposed dispute resolution process is outlined below:

1. The parties will use reasonable endeavours acting in good faith to settle the dispute as soon as practicable.
2. Formal process will be instigated by either party providing the other with a notice of dispute in writing.
3. The dispute resolution process, with appropriate time frames for each step, will follow the order of negotiation and then mediation:
  - i. The dispute will first be the subject of negotiation - senior representatives from each party will meet and use reasonable endeavours acting in good faith to resolve the dispute by joint discussions.
  - ii. Should negotiations fail to resolve the dispute, the second stage will be mediation:
    - a) the dispute will be referred to the chief executive officers of both parties who will attempt to resolve the dispute, including by informal mediation;
    - b) If the dispute is not resolved after being referred to the chief executive officers, the dispute will be referred to formal mediation in Tasmania, to be mediated by a single mediator appointed by agreement of the parties or if they fail to agree, a mediator appointed by the President of the Law Society of Tasmania acting on the request of either party.
4. Conditions relevant to the mediation process would include:



- i. Mediation will be conducted by a mediator under the “Guidelines for Legal Practitioners Acting as Mediators” of the Law Society of Tasmania (whether or not the mediator is a legal practitioner);
- ii. The parties may appoint a person, including a legally qualified person to represent it or assist it in the mediations;
- iii. Each party will bear its own costs relating to the preparation for and attendance at the mediation; and
- iv. The costs of the mediator will be borne equally by the parties.

## 9. Draft Recommendations

The discussion above, combined with early stakeholder consultation, demonstrates that there would be significant benefit to all parties if the new access framework is clear, simple and easily accessible. The draft recommendations below reflect this principle.

### **Draft Recommendation 1:**

The principles underlying the Tasmanian Rail Access Framework should be:

1. The principles of the National Access Regime and Competition Principles Agreement apply in Tasmania regardless of the form of the access framework.
2. All accredited operators should be able to share the capacity of the upgraded TRN.
3. The role of the below rail operator is to manage the requirements of all above rail operators in a way that maximises the utility of the railway network for its users, which includes giving priority to freight, works and other users (in that order).
4. Access fees are set by the Tasmanian Government and will be substantially lower than access charges elsewhere in Australia because maintenance and capital contributed by the Australian and Tasmanian governments are not reflected in the network charges.
5. The network operator retains residual discretion, that is, the access framework does not provide a contractual obligation but rather provides third party operators with a right to negotiate access and to seek arbitration if they are unable to secure appropriate train paths in a timely manner.

6. The expectation that the benefits of government investment in improving infrastructure will be passed on to end customers via increased downstream competition.
7. The pathway to seeking access should be clear and easily understood by third party operators, with publicly available documents to support this process.
8. The access framework should be supported by a simple, low cost and independent dispute resolution process.
9. The below rail and above rail businesses of TasRail should be functionally ring-fenced for the purposes of determining the cost base for access charges and in assessing applications for access to the TRN.

### **Draft Recommendation 2:**

The most fit-for-purpose approach given the current ownership of the TRN and the current market for use of that network, is to establish a clear and transparent State-based Rail Access Policy (option 7.1.4) including provisions for an accessible, State-based dispute resolution process and a revised access pricing schedule.

### **Draft Recommendation 3:**

The Rail Access Policy and Framework should take a light handed regulatory approach, based on the principle of negotiated, rather than regulated, outcomes.

### **Draft Recommendation 4:**

In relation to the scope of the new access framework, it is recommended that:

1. there is effectively no change to the scope of infrastructure and services covered by the access framework from the coverage of the 2007 Determination, apart from updating to reflect the current network (e.g. include the Melba line), however it should be expressed in a simpler form such as “the infrastructure services covered are the rail track and yards associated with the Tasmanian Rail Network and the services needed for the operation of these, such as train control”;
2. there is no change to the prioritisation of access to the network, that is, freight, works (including emergency access) and other users, in that order;
3. accreditation and access can be progressed concurrently, with the ability to provide in-principle or conditional approval for access based on the attaining of accreditation and, where necessary, the funding of infrastructure improvements;
4. responsibility for funding investment or upgrades to the network is clearly defined. That is, funding for investment to ensure the infrastructure is fit-

for-purpose will be the responsibility of the third party access seeker to the extent that it is not invested to improve the efficiency and effectiveness of freight rail services; and

5. any increase in costs, such as insurance, that will be incurred by the below rail provider that are incurred solely to allow a service to operate on the TRN should be recovered directly from the access seeker.

**Draft Recommendation 5:**

The access charge pricing methodology should:

1. update the cost base to reflect current expenditure on below rail services on the operational TRN; and
2. introduce a two-part charge that accounts for the fixed costs of providing the TRN and the variable costs attributable to the operation of above rail services.

**Draft Recommendation 6:**

The Tasmanian Government should produce, and make publicly available, a:

1. clear and simple access framework, including access charges and a simple, low cost dispute resolution process;
2. pricing methodology that can be used for the consistent determination of future charges for new lines or services; and
3. basic guide to obtaining access to the TRN as a simple guidance document to assist those who may wish to seek access.

**Draft Recommendation 7:**

TasRail should produce, and make publicly available, a:

1. document setting out the requirements to access the network (such as technical specifications of the below rail infrastructure, communications systems and safety management requirements); and
2. draft / sample access agreement to assist in clarifying roles and responsibilities of the below rail infrastructure provider and the access seeker.

## 10. *Strategic Infrastructure Corridors (Strategic and Recreational Use) Act 2016*

The *Strategic Infrastructure Corridors (Strategic and Recreational Use) Act 2016* provides an alternative mechanism to access parts of the TRN under certain circumstances and in some cases may be a more appropriate framework for some parties to seek access.

The Act provides a framework to facilitate the alternative use of non-operational rail lines on the TRN, and to provide for their ongoing management. This includes that a corridor may be leased for the purposes of tourist or heritage rail.

Once land has been declared to form a strategic infrastructure corridor, it will change its status from being a railway and will no longer be administered under the governance and management framework applicable to the TRN. Rather, the land will be administered under the Act, which establishes a framework to reserve the corridor as a key strategic asset for the State and to provide for its ongoing management.

Until such time as land is declared to form a Strategic Infrastructure Corridor, it remains as part of the TRN, leased to TasRail for operation and management.

The Government is open to considering alternative uses of non-operational railway lines on the TRN, including for potential heritage and tourist rail services. As such, this Act may provide an alternate pathway for tourist and heritage rail proponents to access non-operational lines.

# 11. Feedback / Comment

The Department of State Growth welcomes feedback and comments on the draft recommendations contained within this Discussion Paper to inform the final advice to be provided to Government.

Representatives from the Department will also be available to meet directly with key stakeholders and interested parties to discuss the development of the new access framework and access prices.

Comments should be provided in writing by **31 January 2018** to:

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